Supreme Court, U.S.
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No. 91-84

In The

Supreme Court of the United States

October Term, 1991

DEBORAH BELCASTRO-BOWEN, et al.,

Petitioners,

v.

DELTA AIR LINES, INC. and MARILYN WILEY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT DELTA AIR LINES, INC.

WALTER A. BRILL
MARY E. RAINES
DELTA AIR LINES, INC.

GILMORE F. DIEKMANN, JR.
BRONSON, BRONSON & MCKINNON
505 Montgomery Street
San Francisco, CA 94111-2514
Telephone: (415) 986-4200

Attorneys for Respondent Delta Air Lines, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The question raised by petitioners does not present an issue that is proper for review by this Court because the factual assertions underpinning the argument are unsupported by the record, there being no question that the attorney in the *Wiley* action – the only case certified and settled as a class action – had the consent of each of his four clients and class representatives to execute the agreement and to present it to the district court for approval. Consequently, the only real question presented by the petition is whether approval of individual class members is a prerequisite to court approval of a class action settlement that is presented to the court for approval with the recommendation of the individual class representatives and class counsel.

LIST OF PARTIES

The Respondent is Delta Air Lines, Inc.[1]

The Petitioners are Deborah Belcastro-Bowen; Marleena Reiser; Alice Moloney Adams; Pamela R. Bailey; Judith D. Beal; Carol Bunce; Stephanie Cohen; Deborah L. Connor-Cook; Barbara J. Daly; Sheila J. Dickerson; Wendy Dillon; Joan H. Doram; Debra Dubord; Connie M. Forde; Roberta May Freeman; Lawrence Hahn; Gail Louise Haller; Emily D. Heath; Carol A. Hogan; Marcella Hunt-Peterson; Carole Leavelle; Sharon Lessinger; Chrissie B. Lovold; Susan L. Magliano; Mary Ann Pearson; Diane Reilly, Toby S. Sadasky; Anabelle Simmons; Cyndee Rae Sinardi; Patricia L. Smith; Rhonda J. Svendsen; Jennifer Terrio; Jo Anne Utz; Laraine Valdespino-Pozzo; Linda Johnson Walden; Janice M. Waller; Cynthia Weber; Gina Youngren; Sandy Yslas-Vanderburg; and Kathy Zablocki.

The parties to the proceedings below are petitioners and respondents in this Court, except that Craig Andrews; Pamela Brenot; Constance S. Cramer; Sandra S. Foley; Barbara Jensen-Amdjadi; Sharon Miller; Colleen Smith; Elise Stevens and Cheryl Wendell were appellants below, but are not petitioners in this Court.

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[1] There is no parent company of Delta Air Lines, Inc. and there are no subsidiaries of Delta Air Lines, Inc. which have issued shares to the public. Delta Air Lines, Inc. holds an approximately 20% equity interest in the following companies which have issued shares to the public:

Atlantic Southeast Airlines, Inc.
SkyWest, Inc.
Comair Holdings, Inc.

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DELTA AIR LINES, INC. and MARILYN WILEY, et al.,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT DELTA AIR LINES, INC.

Respondent Delta Air Lines, Inc. respectfully prays that this Court deny the petition for a writ of certiorari filed by Deborah Belcastro-Bowen, et al. because the factual assertions upon which their argument is based are unsupported by the record and because there is no important question raised by the petition meriting review by this Court.

OPINIONS BELOW

The unpublished memorandum of the Court of Appeals for the Ninth Circuit, entered April 15, 1991, is reprinted in the Petitioners' Appendix at 1a.

The unreported order of the district court granting class certification and approving the class settlement, entered June 28, 1989, is reprinted in the Petitioners' Appendix at 12a.

JURISDICTION

The Memorandum for the Court of Appeals for the Ninth Circuit affirming the judgment of the district court was entered on April 15, 1991. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1).

FEDERAL RULE INVOLVED

Rule 23(c)(1) and (e) of the Federal Rules of Civil Procedure (Fed.R.Civ.P. 23(c) and (e)) provide in pertinent part:

. . .

> (c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

. . .

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

1. Petitioners' Claims.

Petitioners have misrepresented several aspects of the facts in the record of the previous proceedings, and respondent therefore believes it appropriate to clarify the facts underlying this matter.

Petitioners are former Western Air Lines, Inc. (Western) flight attendants who voluntarily resigned their employment with Western and therefore were eligible for free and reduced rate travel privileges on Western under a series of "early out agreements" between Western and its employee unions. Petitioners allege that Delta Air Lines, Inc. ("Delta") impermissibly altered their travel privileges after it merged with Western in 1987. They include several individuals who were part of a group of 42 plaintiffs in a federal court action in Seattle and a number of additional individuals who were members of the class certified below. After extensive settlement negotiations in the action below (*Wiley v. Delta*) and the Seattle case (*Eaton v. Delta*), the parties reached a fair, adequate and reasonable settlement. The settlement was preceded by a full trial based predominantly on a stipulated record, a fairness hearing held subsequent to the district court's

preliminary approval of the Settlement Agreement, and tentative certification of a class.

Petitioners objected to the settlement below, and continued to attack the agreement on appeal, arguing that its provisions did not give the plaintiffs and the class all they wanted and therefore was inadequate. Here, they argue the agreement was forced on them without their consent. They continue to press their appeal despite the district court's finding that the settlement on the whole gave the petitioners more than they could have expected from a judgment from the court.

2. Case History.

Between 1984 and 1986 Western sought to reduce the size of its workforce by offering an "Early Out" program to its various employee unions. Petitioners resigned from Western under these programs in return for free and reduced rate travel benefits for them and certain of their family members. After Western merged into Delta in 1987, Delta continued to provide travel privileges over the former Western system to the early-out participants, but modified certain procedural and operational aspects of the program to make it consistent with the existing travel privilege structure Delta provided for its own employees and retirees.

In 1987, two lawsuits were filed against Delta to enforce the Early-Out Agreement: a 4-plaintiff action entitled *Wiley v. Delta Air Lines, Inc.*, No. 87-2273 (N.D.Cal.), alleged to be a class action on behalf of all early-out participants, and a 42-plaintiff action entitled *Eaton v.*

Delta Air Lines, Inc., No. 87-748 (W.D.Wa.). Jurisdiction was premised on 28 U.S.C. §§ 1331 and 1337 and 28 U.S.C. § 1132. Six of the 42 *Eaton* plaintiffs are among the petitioners here. Plaintiffs' attempt at class certification prior to any discovery or pretrial proceedings was rejected by the *Wiley* court, and by 1989, both courts had denied summary judgment motions by Delta but had ruled that the Early Out Agreements had established employee welfare benefit plans that were subject to ERISA. This latter ruling was subject to reconsideration at the trial of the action. The *Wiley* case was tried in November of 1988.

In January 1989, while awaiting the district court's trial decision in *Wiley*, Delta entered into a proposed Settlement Agreement in both *Eaton* and *Wiley*. The settlement was reached primarily because the district court in the Western District in Washington had ordered the *Eaton* case, which involved issues identical to those raised and tried in *Wiley*, into mediation. The Settlement Agreement required dismissal of the *Eaton* and *Wiley* actions with prejudice, and the certification of a class under Fed.R.Civ.P. 23(b)(1) and (b)(2) in *Wiley*. (Petitioners' Appendix at 6a.)

The attorney for the four *Wiley* plaintiffs (David Rosenfeld), with his clients' support and approval, moved the *Wiley* court for class certification and sought approval of a notice to the class. The motion was supported by Delta, which noted that the issues that previously had precluded class certification had been resolved in the discovery process and that a settlement binding on the class was necessary in order to avoid inconsistent and conflicting adjudications of the common issues involved.

The motion was further supported by the declarations of the plaintiffs' and defendant's attorneys, as well as a declaration from the attorney for the 42 plaintiffs in *Eaton* (Fredric Reed).[2]

Petitioners here allege that, in order to secure the settlement, (1) *Eaton* plaintiffs' attorney Mr. Reed misrepresented in his declaration the degree of support for the Settlement Agreement which he had elicited from the 42 *Eaton* plaintiffs, and (2) *Wiley* plaintiffs' attorney and class counsel Mr. Rosenfeld stated to one of the class members that he would not get paid if the settlement was not approved (a statement Mr. Rosenfeld denies making).

All of petitioner's arguments with respect to whether all of Mr. Reed's clients fully agreed to the settlement are irrelevant because Mr. Reed was not class counsel and his clients were not class representatives – he was not an attorney of record in *Wiley* and he acted as counsel only for the forty-two individual plaintiffs in the *Eaton* case, who, as members of the class, would be bound regardless of their approval. Their consent was not necessary to validate the settlement in *Wiley*. Later, the Ninth Circuit found that "[As] to the questioned activities of [Mr.] Reed, the district court reviewed the written allegations, received supplemental declarations from Reed explaining his declaration, held a hearing, and then concluded that his conduct had not 'tainted' the decision by the court 'to

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[2] The district court accepted Mr. Reed's subsequent explanation that he based his declaration representing that he had the approval of the *Eaton* plaintiffs on a "majority rule," i.e., he had received approval from 37 of the 42 plaintiffs in that action.

tentatively certify the class and to request a fairness hearing on the proposed settlement.'" (Petitioners' Appendix at 11a) As to the petitioners' complaints about Mr. Rosenfeld, the district court observed:

> [T]here has been a showing made that Rosenfeld was not always gracious and patient when dealing with class members and that he did not respond to all requests for legal advice. However, these actions did not prejudice the case he competently and vigorously presented to this Court. In addition, Rosenfeld was technically not representing the class members, other than the named plaintiffs, before this Court tentatively certified the class following trial. Thus, any refusal on his part to respond to legal inquiries beyond direct issues related to class certification was not inappropriate until after the class was in fact certified.

Petitioners' Appendix at 21a-22a.

Based on a preliminary review of the agreement and the various declarations, the district court ordered a fairness hearing to afford class members an opportunity to object to the settlement and the class certification; the court also tentatively certified a (b)(1) and (b)(2) class and authorized a notice to the class informing it of the tentative class certification, the proposed settlement agreement, and the scheduled hearing to consider objections to the agreement and to the class certification. The proposed class consisted of 612 former Western employees. (Petitioners' Appendix at 18a)

A group of objectors, the Bowen group, consisting of most of the petitioners here, filed a motion to suspend the fairness hearings and decertify the class, principally on the ground that the Settlement Agreement had been

entered into without approval or authority of the *Eaton* plaintiffs. The court rejected the motion, stating that the *Eaton* plaintiffs could express their objections at the fairness hearing.

Prior to the fairness hearing the court received comments on the proposed Settlement Agreement from 94 individuals, 84 of whom opposed it. At the fairness hearing, the court heard and entertained oral argument from counsel for the objectors. The court heard testimony of 26 members of the proposed class and two of the *Eaton* plaintiffs in opposition to the settlement. All proposed class members who attended the fairness hearing were given the opportunity to address the court regarding the proposed agreement. At the end of the hearing, the court also heard brief oral arguments of counsel for the plaintiffs in *Wiley* and counsel for Delta in support of the agreement.

Petitioners' allegation that the district court failed to acknowledge the issue of the class members' consent to the Settlement Agreement simply ignores the record, and is without merit. The court only issued its order certifying the class and approving the Settlement Agreement after considering the briefs submitted by the parties, the trial record in the action, the terms of the proposed Settlement Agreement, and testimony and comments of the proposed class members presented at the fairness hearing. (Petitioners' Appendix at 11a) The text of the court's order granting class certification and approving the settlement explicitly addresses and dismisses the plaintiffs' assertion that they were in any way inadequately represented by counsel. (Petitioners' Appendix at 19a-22a.)

On appeal to the Ninth Circuit, petitioners recast their inadequate representation claims, characterizing the same allegations as claims of "fraud, collusion, and overreaching." Petitioners asked the court not to use class action procedures to "sanction" a settlement agreement entered into without the express consent of all the putative class members. The court rejected the argument based on two separate findings. First, it specifically found that:

> [T]he district court did exactly what this court has asked district courts to do when deciding whether to accept a proposed settlement agreement. The record makes clear that the district court came to a reasoned judgment that the agreement was not the product of fraud, collusion or overreaching, and the district court expressly determined that it was fair, reasonable and adequate to all concerned parties.

(Petitioners' Appendix at 11a.)

The Court of Appeals also held that the district court had not abused its discretion in finding that the conduct of the *Eaton* plaintiff's counsel had not "tainted" the court's decision to tentatively certify the class and to request a fairness hearing on the proposed settlement. Based on the record, it noted that the district court had engaged in a thorough analysis in conformance with the law on class action settlements, and properly had reviewed the written allegations, supplemental declarations from Mr. Reed, and extensive oral argument and testimony by plaintiffs at the fairness hearing. It observed that the district court had responded specifically to the

plaintiffs' concerns about attorneys fees[3] and an allegedly abrasive interaction between class counsel and one of the class members, and found that the trial court did not abuse its discretion in concluding that these actions did not rise to the level of fraud, collusion or overreaching. (Petitioners' Appendix at 10a-11a.)

The Ninth Circuit concluded its opinion by noting:

> The district court was in a unique position to determine the fairness of this particular settlement agreement. The court had conducted a two-day trial and was prepared to issue a ruling on the merits when the parties presented the court with the agreement. The court issued a twenty page order explaining why it found the agreement to be reasonable, adequate and fair; indeed the court was "doubtful the plaintiffs could have achieved such an outcome." This court's independent review of the record supports the district court's conclusion. Accordingly, we hold that the district court did not abuse its discretion.

(Petitioners' Appendix at 12a.)

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[3] The Ninth Circuit observed "[C]ontrary to appellants' allegations, the court did respond specifically to the objectors' concerns about the attorneys' fees. The district court found the fees to be "reasonable," and noted: "it is sometimes a distasteful reality that the practice of law is a business and that lawyers are entitled to fees for their services." (Petitioners' Appendix at 22a and 11a)

ARGUMENT

PETITIONERS FAIL TO RAISE AN IMPORTANT ISSUE UNDER FEDERAL LAW BECAUSE THE DISTRICT COURT SATISFIED ANY STRICT SCRUTINY REQUIREMENTS IN ASCERTAINING THE FAIRNESS, ADEQUACY AND REASONABLENESS OF THE SETTLEMENT AGREEMENT AND THE APPROPRIATENESS OF CERTIFYING A CLASS

Petitioners seek review in this Court based on their assertion that the procedure used by the district court in certifying a class for the purpose of settlement violated Fed. R. Civ.P. 23(c)(1) and (e). They specifically allege that Fed.R.Civ.P. 23(c)(1) precludes a trial court from certifying a class only for settlement, and that the district court violated Rule 23(e) by approving the *Wiley* settlement without the approval of the putative class members.

(1) Certification of a class in connection with a settlement agreement is fully consistent with Rule 23 Procedures and Due Process Requirements.

This Court need not look beyond the very cases cited by petitioners to find that the district court's approval of the Settlement Agreement and certification of a class in the face of objections by some of the putative class members is fully consistent with Rule 23's requirements. While the practice of deferring class certification until settlement has been criticized in some circumstances, every court addressing the issue has declined to hold that the procedure violates Fed.R.Civ.P. 23 or requires that the certification or settlement be disapproved. *Mars Steel v. Continental Ill. Nat. Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987), later proceeding *Mars Steel Corp. v. Continental Ill. Nat. Bank & Trust Co.*, 120 F.R.D. 53 (N.D. Ill. 1988),

aff'd, en banc *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989). In *Weinberger v. Kendrick*, 698 F.2d 61, 73 (1982), the Second Circuit stated that "[W]e emphasize that we are permitting, not requiring, use of this procedure, and also underscore that . . . district judges who decide to employ such a procedure are bound to scrutinize the fairness of the settlement agreement with even more than the usual care".

Petitioner's reliance on *In the Matter of American Reserve Corp.*, 840 F.2d 487 (7th Cir. 1988), is misplaced. There, the Seventh Circuit's misgivings concerning the desirability of class certification are specifically addressed to the context of the Bankruptcy Court, which is already a collective proceeding. *Id.* at 490, 493. A more careful reading of the authorities cited by petitioners reveals that a trial court certifying a class in the context of a settlement must simply be particularly careful in scrutinizing the fairness of the proposed settlement agreement.

The more careful scrutiny principle has been adopted by some courts to assure against the possibility of collusion or undue pressure by defendants on would-be class representatives. *Simer v. Rios*, 661 F.2d 655 (7th Cir. 1981). *Weinberger v. Kendrick*, 698 F.2d 61, 72-73 (2d Cir. 1982). Rather than setting down any form of absolute rule, however, the decisions place discretion in the district court to assess the strength of the party's case, the prejudice to absent class members caused by settlement, the institutional costs of certification and hearing, and the possibility of collusion; and they subject the court's decisions on those issues only to a deferential "abuse of discretion" standard of review. *Mars Steel, supra*, 834 F.2d at 862; *Simer, supra*, 661 F.2d at 666. In determining the

fairness of a settlement agreement, courts have examined the substantive terms of the settlement and the negotiating process by which the settlement was reached, have demanded that the compromise be the result of arm's-length negotiations, and have determined whether plaintiffs' counsel possessed sufficient experience and ability and engaged in the discovery necessary to effectively represent the class' interest. *Weinberger, supra,* 698 F.2d at 73-74.

(2) The *Wiley* court meticulously considered the fairness of the settlement agreement in compliance with the most demanding tests outlined in applicable case law.

One look at the district court's ruling in *Wiley* dispels any doubts that the court engaged in an exacting review of exactly these types of concerns. It did not issue its final order approving the settlement until after notice had been served on all of the putative class members and after a full hearing on the fairness of the Settlement Agreement, at which a large number of the petitioners testified about their objections. The court was in a unique position to evaluate the strengths and weaknesses of the *Wiley* Settlement Agreement because it had tried the case and was prepared to rule on the merits just as the parties came to court with the proposed agreement. The court discussed each of plaintiffs' claims on the disputed travel privileges, the issue of attorney's fees and costs, petitioner's allegations of inadequate representation by counsel, and the appropriateness of certifying the class under Fed.R.Civ.P. 23(b)(1) and (b)(2), concluding that certification was proper and that the settlement was very fair,

reasonable and adequate. On the issue of including fees for class counsel in the settlement, the court noted that inclusion of a fee in a settlement agreement does not create a conflict of interest under well-established Supreme Court authority (*Evans v. Jeff D.*, 475 U.S. 717 (1986), reh. denied *Evans v. Jeff D.*, 476 U.S. 1179 (1986)), and held that the fee involved was reasonable. Finally, the court also stated "[I]t is not the Court's duty to decide whether a better settlement for either party could have been reached, although the Court is doubtful that plaintiffs could have achieved such an outcome." (Petitioners' Appendix at 27a-28a.)

Petitioners stake a significant portion of their argument on the proposition that an attorney has an absolute ethical duty to secure a client's approval before entering into a settlement agreement, and that attorneys have no authority to settle an action without their client's approval. Petitioners' reliance on *Harrop v. Western Air Lines, Inc.*, 550 F.2d 1143 (9th Cir. 1977), *Fennel v. TLB Kent Co.*, 865 F.2d 498 (2d Cir. 1988) and *Garabedian v. Allstates Engineering Co.*, 811 F.2d 802 (3d Cir. 1987), for this argument is misplaced, because all of these cases concern an individual suit; none involves a class action suit.

It is important to note that *all* of the *Wiley* plaintiffs – the only plaintiffs certified as class representatives – approved the settlement agreement. Petitioners do not allege to the contrary. Thus, *all* of plaintiffs in *Wiley* – the case that was certified as a class action and settled on that basis – did approve it and consent to the settlement. None objected to it. Whether the individual plaintiffs in *Eaton*, who had no greater standing than any other class

member, approved the settlement is a subject of no material relevance. They were bound to the same extent as all class members.

Second, class actions are not subject to a requirement of prior approval of all class members. The district court acknowledged that not all class members approved the settlement, and correctly stated that this was only one factor that the court was required to consider when deciding whether the settlement should be approved. That a class action suit may be settled without absolute unanimity within the putative class is soundly supported by case law. A settlement is not made unfair or unreasonable because a large number of class members oppose it. *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977), later proceeding *Cotton v. U.S. Pipe & Foundry Co.*, 856 F.2d 158 (11th Cir. 1988), reh. denied, en banc *Cotton v. U.S. Pipe & Foundry Co.*, 861 F.2d 1281 (11th Cir. 1988) (approving a settlement opposed by 50% of the class); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 803 (3d Cir. 1974), *cert. denied sub nom. Abate v. Pittsburgh Plate Glass Co.*, 419 U.S. 900 (1974), reh. denied *Abate v. Pittsburg Plate Glass Co.*, 420 U.S. 913 (1975) (approving settlement opposed by over 20% of the class); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982) (approving a settlement over the objections of approximately 56% of the class).

Accordingly, petitioners have failed to demonstrate that the fact that some of the members of the class opposed the Settlement Agreement in any way affected the validity of the Agreement itself or the district court's

certification of a class. The record in this action establishes that the class certification procedure approved by the district court was proper, in accordance with all applicable authorities, and in no way prejudiced the petitioners' ability to assert their beliefs regarding the agreement or its fairness.

CONCLUSION

For the reasons discussed above and in the Ninth Circuit District Court's opinions, this Court should deny this petition for a writ of certiorari.

Dated: August 13, 1991

Respectfully submitted,

WALTER A. BRILL
MARY E. RAINES
DELTA AIR LINES, INC.

GILMORE F. DIEKMANN, JR.
BRONSON, BRONSON & MCKINNON

By: GILMORE F. DIEKMANN, JR.
Attorneys for Respondent
Delta Air Lines, Inc.
Gilmore F. Diekmann, Jr.